Supreme Court, U.S.
FILED
JUN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-2051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARRY LEON JOYNER,
Petitioner,

v.

MANLEY LANCASTER AND COUNTY OF FORSYTH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit erred in determining that the weighing of the balancing test established in Pickering v. Board of Education, 391 U.S. 563 (1968), is a matter of constitutional law for determination by the court, not a question of fact for resolution by a jury.

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Respondents Manly Lancaster and the County of Forsyth respectfully request

that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

The Respondents, Manly Lancaster and the County of Forsyth, generally agree with the Petitioner's statement of the case (Pet. 4-8), with the exception that Respondents disagree with the Petitioner's characterization of the District Court's decision to submit an issue to an advisory jury. It is incorrect to imply that the District Court did not indicate that the jury was serving an advisory function until after the jury verdict was rendered.

In fact, at the close of plaintiff's evidence and in response to defendants'

motions to dismiss, the trial judge announced on the record that, before reading Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985), he had determined that the entire balancing test was a question of law for the court, but that the Fourth Circuit case had made him somewhat uncertain about that conclusion. (App. 362). Because of that uncertainty, the court proposed submitting "the second prong of the balancing test" to the jury, stating, "There is nothing wrong with the Court getting an advisory opinion from a jury." (App. 363). Both parties expressed their general agreement with the court's proposal. (App. 363).

Respondents also propose that the following sentence be added to Petitioner's statement of the case: The

trial court determined that the advisory jury's verdict "was against the clear weight of the evidence" (Pet. A-35), and the Court of Appeals reinforced this determination (Pet. A-8 and A-14).

Respondents do not accept Petitioner's recitation of "The Facts" (Pet. 8-16). Respondents' rely on, and incorporate by reference herein, the facts recited by the District Court and the Court of Appeals in the opinions below. (Pet. A-2 through A-43).

REASONS FOR DENYING THE WRIT

This case is not one in which a writ of certiorari should be granted. The Petitioner argues that the question presented is an important question of federal law which has not been settled by this Court. Of course, both the District Court and the Court of Appeals

for the Fourth Circuit determined that Pickering v. Board of Education, 391 U.S. 563 (1968), and Connick v. Myers, 461 U.S. 138 (1983), effectively settled the question that Petitioner claims is unsettled. In Connick, this Court clearly held that weighing the Pickering balance is a matter of law for the court and not a matter of fact for consideration by a jury. 461 U.S. at 148 and 150.

Petitioner also argues that there "is considerable confusion among the federal courts of appeal concerning this issue." (Pet. 23). Although some confusion may be perceived in cases decided before 1983, Connick v. Myers resolved whatever confusion may have existed. Petitioner's reliance on "pre-Connick cases" artificially confuses the issue.

The only post-Connick case cited by the Petitioner as conflicting with the Court of Appeals' determination in the present case is Lewis v. Harrison School District No. 1, 805 F.2d 310 (8th Cir. 1986), cert. denied, ____ S. Ct. ____ (June 1, 1987) (No. 86-1618). Although the Eighth Circuit in Lewis and the Fourth Circuit in the present case apparently disagree on the role to be played by a jury when the Pickering balance is weighed, the apparent disagreement does not warrant granting a writ of certiorari in the present case.

Both the Eighth Circuit in Lewis and the Fourth Circuit in the present case recognized that weighing the Pickering balance is ultimately a question of law for the court to decide. Lewis, 805 F.2d at 315; Joyner, Pet. A-12. In

Lewis, the Eighth Circuit disagreed with the trial court's weighing of the balance in that case, and the Eighth Circuit found evidence to support the jury's determination that the public employee's speech would not create such disharmony in his relationship with his supervisor that the employee would not be able to do his job. However, the Eighth Circuit indicated that the jury's findings need not be followed if they were unsupported by the record. In the present case, the Fourth Circuit agreed with the District Court's weighing of the Pickering balance, and the Court of Appeals agreed with the trial court that the jury's determination was "against the clear weight of the evidence." (Pet. A-8 and A-14).

In both Lewis and the present case, the Courts of Appeals reviewed the evidence considered by the trial courts and the juries in question and reached conclusions about the reasonableness of the findings below. The Petitioner in this case merely seeks another review by this Court. The Petitioner's request would require this Court to conduct a factual review of a lengthy trial record to ascertain whether the record evidence supports the decision of the Fourth Circuit. This Court has previously ruled: "We do not grant certiorari to review evidence and discusss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). That the Petitioner seeks a re-determination of the facts in this case is made blatantly clear in pages 45-50 of the Petition, where the

Petitioner outlines his disagreement with the evidence cited by the District Court and the Court of Appeals.

Both the District Court and the Court of Appeals, carefully considered the evidence presented at the trial of the present case and reached the following conclusions: the Pickering balance weighed clearly in favor of the public employer, and the jury's advisory verdict was against the clear weight of the evidence. Thus, even if this Court would grant a writ of certiorari and later rule, contrary to Connick, that juries should play a part in weighing the Pickering balance, the Court would still have to decide again whether that balance tipped in favor of the employer or employee in the present case and whether the jury's verdict was against

the clear weight of the evidence. These determinations have already been made by both the District Court and the Court of Appeals in favor of the Respondents. The Petitioner's attempt to obtain a third judicial opinion should be denied.

CONCLUSION

Therefore, because the Petition for Writ of Certiorari fails to raise arguments that meet the standards for granting certiorari, the Petition should be denied.

Respectfully submitted,

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